

NTSB Order No. EA-5129

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of December, 2004

Respondent.

Docket SE-17214

The Administrator has appealed from the November 4, 2004, oral initial decision and order of Administrative Law Judge William R. Mullins,¹ which affirmed the Administrator's emergency revocation of respondent's private pilot and medical certificates but reversed the revocation of his mechanic certificate. The Administrator's emergency order was based on respondent's violations of 14 Code of Federal Regulations §§ 91.17(a)(2),

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91.17(a)(4), 91.119(a), 91.119(b), and 91.13(a),² and his failure to meet the medical standards set forth in 67.307(b)(3).³ As

² **§ 91.17 Alcohol or drugs.**

(a) No person may act or attempt to act as a crewmember of a civil aircraft --

* * * *

(2) While under the influence of alcohol;

* * * *

(4) While having .04 percent by weight or more alcohol in the blood.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ **§ 67.307 Mental.**

Mental standards for a third-class airman medical certificate are:

* * * *

(b) No substance abuse within the preceding 2 years defined as:

* * * *

(3) Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds—

(i) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied

further discussed below, we deny the Administrator's appeal and affirm the law judge's decision.

The emergency order of revocation alleged, in part, the following facts and circumstances:

4. On or about September 15, 2004, at approximately 1:45 a.m., you acted as pilot-in-command of civil aircraft N3832H a Mooney Model M20J aircraft, the property of another, on a flight in the vicinity of Flora, Illinois with a passenger on board.
5. You operated the aircraft mentioned above in erratic maneuvers at a low level altitude that was below 1000 feet AGL (altitudes as low as 75 feet AGL were observed) over the town of Flora, Illinois.
6. You operated the aircraft in erratic movements over Clay City Illinois.
7. You landed the aircraft at the Flora Municipal Airport and continued with erratic taxi maneuvers toward the hangar.
8. Two persons exited the aircraft and proceeded to a hangar. You identified yourself to the Police Officers as the pilot of the aircraft when they approached you in the maintenance hangar.
9. Officer Cook and Officer Snyder smelled alcohol on your breath and requested that you take an Alcohol Breath Analysis test.
10. You voluntarily submitted to the breathalyzer test. You were transported to the Flora Police Department and given the breathalyzer test.
11. The results of the BAT documented that you had a Blood Alcohol Concentration of .172 percent by weight at 2:27 a.m.

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for or held; or

(ii) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.

12. You acted as pilot in command and operated the above-described aircraft when you were under the influence of alcohol.
13. You acted as pilot in command and operated the aircraft when your blood alcohol concentration was over .04 percent by weight.
14. The Federal Air Surgeon finds that your misuse of alcohol makes you unable to perform the duties and exercise the privileges of any airman medical certificate.
15. Your operation of the aircraft, in the manner and under the circumstances described above, was reckless so as to endanger the lives and property of others.

Respondent filed a pre-hearing petition for review of the Administrator's emergency determination with regard to his mechanic certificate. (He did not challenge the emergency revocation of his pilot and medical certificates.) On October 22, 2004, Chief Judge William E. Fowler, Jr., granted respondent's petition, finding that the incident described in the emergency order was unrelated to respondent's performance as a mechanic and, therefore, did not warrant the immediate surrender of his mechanic certificate. He noted the Administrator had not alleged that respondent's work as a mechanic had ever been compromised by the use of alcohol, or that he was a habitual alcohol user. Accordingly, Judge Fowler stayed the effectiveness of the Administrator's revocation of respondent's mechanic certificate, pending the outcome of this proceeding.

At the beginning of the hearing, respondent stipulated to all of the facts alleged in the Administrator's complaint and agreed to the revocation of his pilot and medical certificates.

Therefore, the hearing was limited to the issue of sanction with regard to respondent's mechanic certificate. In his initial decision and order, Judge Mullins noted that respondent relies on his mechanic certificate for his livelihood,⁴ but stated that economic impact on a certificate-holder is not relevant to sanction determinations. He found that revocation of respondent's mechanic certificate under these circumstances was not appropriate because the conduct and violations here at issue pertained to respondent's exercise of his pilot certificate, and were not in any way related to his work as a mechanic. In addition, he noted that there is no specific regulatory authority supporting the revocation of respondent's mechanic certificate under such circumstances.

On appeal, the Administrator argues that respondent has demonstrated an extreme lack of care, judgment, and responsibility, which warrants revocation of all his FAA-issued certificates, not just his pilot and medical certificates. Specifically, the Administrator asserts that respondent's behavior on September 15 was so reckless, and demonstrated such contempt for aviation safety and regulatory compliance that the Administrator can no longer trust him to comply with any FAA regulations, including those that apply to his mechanic privileges. The Administrator also requests that we issue an

⁴ Respondent testified that he holds a mechanic certificate with Airframe and Powerplant ratings and an inspection authorization.

advisory ruling⁵ indicating our disapproval of Judge Fowler's grant of respondent's petition challenging the Administrator's emergency determination, which was based on the premise that the violations need to be related to the exercise of privileges under a particular certificate in order to justify revocation of that certificate. The Administrator points out that revocation of all FAA-issued certificates has been upheld in cases of intentional falsification, even absent any such relation.

In reply, respondent argues that the FAA's regulations do not support revocation of his mechanic certificate for the operational violations here at issue. Respondent emphasizes that the Administrator freely admitted in discovery that she was unaware of any improper actions by respondent while exercising the privileges of his mechanic certificate or inspection authorization.

We are not unsympathetic to the Administrator's position. Indeed, we agree that the respondent's conduct on September 15 (operating an aircraft when highly intoxicated, flying erratically and at excessively low altitudes over a congested area with a passenger on board) was egregious, and demonstrated such a lack of care, judgment, and responsibility that it calls

⁵ Our rules of practice for emergency proceedings state that a law judge's ruling on a petition for review of the Administrator's emergency determination, "shall be final, and is not appealable to the Board. However, in the event of an appeal to the Board from a law judge's decision on the merits of the emergency ... order the Board may, at its discretion, note in its order disposing of the appeal, its views on the law judge's ruling on the petition, and such views shall serve as binding precedent in all future cases." 49 C.F.R. § 821.54(f).

into question respondent's trustworthiness when exercising the privileges of any airman certificate, including his mechanic certificate. We also agree that aviation safety would likely be best served by the revocation of respondent's mechanic certificate along with his pilot and medical certificates. However, in this case, revocation of respondent's mechanic certificate is not consistent with the FAA's regulatory scheme or with the legal principle of fair notice.

The most egregious violations committed by respondent, and the ones for which revocation is clearly supported in the Administrator's sanction guidance⁶ and by our precedent, are the alcohol-related violations of § 91.17(a). Respondent's only other operational violations relate to low flight, which do not generally result in revocation.⁷ Therefore, the remainder of this discussion will focus on the § 91.17(a) violations.

We recognize that the Board's authority under 49 U.S.C. § 44709(d)(3) to modify a sanction ordered by the Administrator is limited. Specifically, we are, "bound by ... all validly adopted interpretations of ... written agency policy guidance available to the public related to sanctions to be imposed ... unless the Board finds an interpretation is arbitrary,

⁶ The Administrator's enforcement sanction guidance table (FAA Order 2150.3A, Appendix 4) specifies revocation or emergency revocation as a sanction for operation of an aircraft while under the influence of drugs or alcohol.

⁷ The Administrator's guidance table specifies a 60 to 180 day suspension for failing to maintain required minimum altitudes over a congested area.

capricious, or otherwise not in accordance with law."

Administrator v. Peacon, NTSB Order No. EA-4607 (1997). However, in this case the Administrator has not cited or asked us to defer to any such interpretation or written policy as it relates to respondent's mechanic certificate.⁸

It should be noted that the Administrator has specifically provided for revocation of pilot certificates (and other airman certificates issued under 14 C.F.R. Part 61) on the basis of alcohol-related offenses prohibited by § 91.17(a) and drug-related offenses prohibited by § 91.19(a).⁹ However, the Administrator has not similarly provided for revocation of mechanic (and other airman certificates issued under 14 C.F.R. Part 65). Instead, the Administrator has promulgated a regulation that authorizes revocation of those certificates only on the basis of the drug-related offenses prohibited by § 91.19(a), and not for alcohol-related offenses prohibited by § 91.17(a).¹⁰ The Administrator's reasons for treating these

⁸ In Peacon, we noted that it is the Administrator's burden under the Act to specifically ask the Board to defer to her sanction determination, supporting her request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law.

⁹ See § 61.15(b), which states, "[c]ommitting an act prohibited by § 91.17(a) or § 91.19(a) of this chapter is grounds for ... [s]uspension or revocation of any certificate, rating, or authorization **issued under this part.**" (Emphasis added.) Part 61 pertains only to pilot, flight instructor, and ground instructor certificates.

¹⁰ See § 65.12(b), which states, "[t]he commission of an act prohibited by § 91.19(a) of this chapter is grounds for ... [s]uspension or revocation of any certificate or rating **issued**

categories of certificate-holders differently are not clear from the available regulatory history, nor has the Administrator offered any argument on this point in her brief. But, regardless of whether or what type of reasons may exist, we cannot ignore the omission of § 91.17(a) from the regulation that governs mechanic certificates.

Accordingly, it is clear from the language of the Administrator's own regulations that violations of § 91.17(a) are a sufficient basis for revocation only of certificates issued under Part 61 (e.g., pilot certificates) and not certificates issued under Part 65 (e.g., mechanic certificates). In contrast, we note that the Administrator's regulations governing sanction for intentional falsifications specifically state that such offenses are grounds for revocation of all airman certificates.¹¹ The specificity of these regulations belies the Administrator's contention that it is unrealistic to expect FAA to write regulations for every possible factual circumstance that warrants revocation. Indeed, it appears the FAA has attempted to do so for certain categories of violations, including precisely those violations under § 91.17(a) here at issue. Having done so, the Administrator is bound by the parameters she has set by those

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under this part. (Emphasis added.) Part 65 pertains to air traffic control tower operators, aircraft dispatchers, mechanics, repairmen, and parachute riggers.

¹¹ See §§ 61.59, 65.20, and 67.403, each of which states that falsification offenses can be the basis for suspending or revoking all airman certificates held by that person.

regulations. If the Administrator thinks that the alcohol-related offenses committed by respondent in this case should be a sufficient basis for revocation of certificates other than those currently specified in the regulations, she is free to revise the regulations accordingly. But until such time as she does, we cannot uphold such revocations consistent with the principles of adequate notice.¹²

Therefore, for the reasons discussed above, we find no error with either Judge Mullins' initial decision or with Judge Fowler's grant of the respondent's petition challenging the emergency determination of the revocation of his mechanic certificate.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is denied and the law judge's initial decision and order is affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order. HERSMAN, Member, submitted the following concurring statement.

Member Hersman, Concurring:

I do not disagree with the revocation of Respondent's pilot certificate, to which he conceded, and which is clearly justified by the facts in this case. However, I would like to address the FAA's position on the revocation of Respondent's medical and mechanic certificates. The decision of Judge Mullins, as well as the decision of the Board to deny the Administrator's appeal in

¹² We must reiterate that our decision should not be construed as condoning or minimizing the gravity of respondent's conduct. As we indicated above, we believe revocation of all respondent's FAA-issued certificates could be an appropriate penalty for his violations. However, that sanction is not permitted by the FAA's regulations as currently drafted.

this case, shine a light on the fact that violations of § 91.17 should not result in de facto revocations of other certificates.

In this case, although the revocation of the medical certificate was not contested, the Administrator's Emergency Order states that the respondent violated the following FAA regulations:

- a. 14 C.F.R. 91.17 (a) (2), which prohibits a person from acting or attempting to act as a crewmember of a civil aircraft while under the influence of alcohol;
- b. 14 C.F.R. 91.17 (a) (4), which prohibits a person from acting or attempting to act as a crewmember of a civil aircraft while having .04 percent by weight or more of alcohol in the blood;
- c. 14 C.F.R. 91.119 (a), which prohibits a person from operating an aircraft except for takeoff or landing below an altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface;
- d. 14 C.F.R. 91.119 (b), which prohibits a person from operating an aircraft except for takeoff and landing over any congested area of a city, town, or settlement below an altitude of 1000 feet above the highest obstacle within a horizontal radius of 2000 feet of the aircraft;
- e. 14 C.F.R. 91.13 (a), which prohibits a person from operating an aircraft in a careless or reckless manner, so as to endanger the life or property of another.

And further, the "Federal Air Surgeon had determined that the Respondent was not qualified to hold a FAA airman medical certificate under 14 C.F.R. 67.307 (b) (3) because Respondent's misuse of a substance made him unable to safely perform the duties or exercise the privileges of any class of medical certificate."

The FAA's medical regulations (14 C.F.R. §§ 67.107, 67.207, and 67.307) state that in order to qualify for a first, second, or third class medical certificate, a pilot must meet the following standard:

(b) No substance abuse within the preceding 2 years defined as:

(3) Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds -

- (i) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held.

Other than a generic statement, "The Federal Air Surgeon finds that your misuse of alcohol makes you unable to perform the duties and exercise the privileges of any airman medical

certificate," there is no support for the Federal Air Surgeon's finding. (See administrative law judges' comments concerning revocation of all certificates.¹³) Not until the hearing do we see any evidence in support of the Federal Air Surgeon's determination. At the hearing, on cross-examination of Respondent's witness, it was disclosed that Respondent pled guilty to an April 2004 DUI conviction. This is exactly the type of information that I would expect the Federal Air Surgeon or the Administrator to include in their original Emergency Order in support of revocation of Respondent's medical certificate per § 67.107. I question when they knew this information and why it was not disclosed in earlier filings if they knew it, but it establishes a pattern of abuse and indicates a review of the case history.

The Administrator's appeal states, "it is unreasonable to expect the Administrator to draft a regulation authorizing revocation for every possible factual circumstance warranting revocation. Further, none of the Part 91 regulations Respondent violated specify or limit which certificate may be the subject of enforcement actions." This is, in fact, the issue at the heart of my concerns, since the Part 91 regulations Respondent violated are not specified in the regulations as the basis for revocation of any certificate(s), other than the pilot certificate, which should be revoked for a violation of § 91.17. Further, I believe it is reasonable for the Administrator to draft regulations specifying the penalty or penalties for a violation of § 91.17, since (1) it is a very serious offense, (2) it is a situation that occurs with some regularity (there have been two appeal cases in the last three months before the Board involving a violation of § 91.17 where the Administrator was seeking revocation of certificates other than just the pilot certificate for a single alcohol violation), and (3) there are two other such

¹³ Administrative Law Judge Mullins concludes that: "While one alleged episode of intoxicated flying unquestionably warrants emergency action against an individual's pilot certificate, so as to immediately curtail further flight activity, it seems that such a single incident, unrelated to that person's performance as a mechanic, does not per se warrant the collateral, instantaneous imposition of a bar on the performance of mechanic work by that individual. Here, there is no allegation either that respondent's mechanic work has ever been compromised by the use of alcohol, or that he is a habitual alcohol user." Similarly, Judge Fowler stated that he was: "unaware of any prior Board decisions which hold that the revocation of an airman's pilot certificate(s) for violating FAR § 91.17 (a) (2) or (4) - which prohibit persons from acting or attempting to act as crewmembers of civil aircraft while under the influence of alcohol or while having a blood alcohol concentration of .04 percent - requires the revocation of all other FAA-issued certificates held by that airman..."

examples of violations that are explicitly addressed: drug-related offenses¹⁴ and falsification of records.¹⁵

On November 9, 2004, the Board issued its decision in Administrator v. Schroeder, NTSB Order No. EA-5121, in which I submitted a concurring statement outlining my concern regarding the FAA seeking simultaneously revocations of both the pilot and medical certificates for a violation of § 91.17. This case appears to be an extension of that practice.

I would urge FAA to either: (1) show that the Federal Air Surgeon is actually employing the discretionary medical judgment that the regulations appear to call for, or (2) as we have stated with respect to the standards for revocation of a mechanic's certificate in this case, amend their regulations to clarify that a violation of 14 C.F.R. § 91.17 (acting or attempting to act as a crewmember while under the influence of alcohol or while having a blood alcohol content of 0.04 or greater) can automatically result in the revocation of the pilot's medical certificate.

Let me be clear. As in Schroeder, I have no argument with the Administrator's position that these single instances of alcohol use constitute a grave risk to aviation safety. I am in complete agreement that the judgment of any aviator that operates an aircraft with more than four times the legal BAC limit should lose his pilot's license as the regulations stipulate, but I would urge the FAA to amend its medical standards, and perhaps in this case, its mechanic standards, if they are going to pursue future revocations based on a violation of § 91.17. Moreover, as in Schroeder, I believe it is inappropriate to continue to rely on the Board's adjudicative authority to uphold a standard that is not codified in the FAA regulations.

¹⁴ See 65.12 (b), which states, "[t]he commission of an act prohibited by 19.19 (a) of this chapter is grounds for...[s]uspension or revocation of any certificate or rating issued under this part.

¹⁵ See 61.59, 65.20, and 67.403, each of which states that falsification offenses can be the basis for suspending or revoking all airman certificates held by the person.